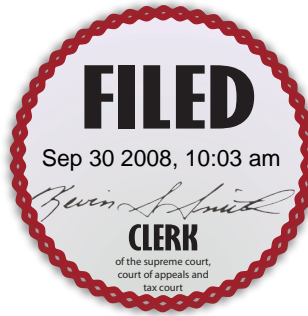


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA ENGLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 47A01-0802-PC-93

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0703-FA-263

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joshua Engler pleaded guilty to Burglary¹ as a class A felony and was subsequently sentenced to thirty-five years with ten years suspended. On appeal, Engler presents three issues for review:

1. Is Engler's sentence inappropriate?
2. Did the trial court abuse its discretion in ordering Engler to pay restitution to the victim of an uncharged crime?
3. Did the trial court abuse its discretion in ordering Engler to pay restitution without inquiring into his ability to pay or fixing the manner of performance?

We affirm in part, reverse in part, and remand.

In the early morning hours of March 20, 2007, Engler and John Pickett engaged in a criminal enterprise to steal car stereos. Engler agreed to go along with Pickett because he needed money to buy drugs. After stealing stereos out of several vehicles, Engler and Pickett decided to break into a garage in which Pickett knew there was a car that had a nice stereo system. At approximately 6:00 a.m., Jesse Parker went into his garage and turned on the light. Jesse saw two individuals in the garage, Engler and Pickett, and asked what they were doing. Engler put his weight against Jesse and yelled for Pickett to help him. Pickett and Jesse then scuffled and Engler fled from the garage. During the altercation, Pickett hit Jesse in the head with a hammer.

As Engler ran from the garage, Rob Parker, Jesse's father, entered. Rob eventually became involved in an altercation with Pickett across the street, during which Pickett stabbed Rob in the head with a screwdriver. Both Jesse and Rob received stitches and staples on their heads because of the wounds inflicted.

¹ Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

On March 26, 2007, the State charged Engler with one count of burglary resulting in “serious” bodily injury (i.e., “extreme pain”), a class A felony. *Appellant’s Appendix* at 11. On November 30, 2007, the State moved to amend the information by adding two counts of burglary as class C felonies, the victims being Rex Fox and Rita Mires, and four counts of theft as class D felonies, the victims being John Ferrel, Kenneth Howard, Jerad Short, and Tygr Sandlin. On December 11, 2007, the trial court granted the State’s motion to amend the charging information. Ten days later, the State moved to strike the amended charges filed on November 30 and to strike the words “serious” and “extreme” from the original burglary charge. On that same day, Engler pleaded guilty to the amended class A felony burglary charge.

On January 16, 2008, the trial court accepted Engler’s guilty plea and thereafter sentenced him to thirty-five years in the Department of Correction with ten years suspended and five years of supervised probation. The trial court also ordered as a condition of probation that Engler pay restitution as follows: \$78.99 to John Ferrel, \$1,778.75 to Rob Parker, and \$4,708.16 to Jesse Parker. In setting forth the sentence, the trial court cited as aggravating (1) Engler’s prior juvenile adjudications, (2) his prior conviction for possession of marijuana, and (3) his recent violation of probation. As mitigating, the trial court cited (1) Engler’s guilty plea, (2) that Engler wrote a letter admitting guilt, (3) that incarceration would be a hardship on Engler’s dependent daughter, and (4) Engler’s young age. The court found that the aggravators outweighed the mitigators.

Engler argues that his thirty-five-year sentence is inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007); Indiana Appellate Rule 7(B). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Thus, "we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

With regard to the nature of the offense, we note that Engler and his accomplice went on a crime spree, stealing several car stereos in the course of a few hours. Their luck ran out when Jesse Parker unexpectedly confronted them in Jesse's own garage. In an effort to get away, Engler swung a hammer at Jesse and yelled for Pickett to help. As Engler fled, Pickett struggled with Jesse and struck him in the head with a hammer. Jesse received staples and stitches about his head. That Engler did not expect to be confronted or plan to hurt anyone does not lessen the seriousness of the offense. As an accomplice, Engler was accountable for Pickett's conduct even though Jesse was directly injured by Pickett as Engler was fleeing the scene. We further note the force used was excessive in that Pickett hit Jesse in the head with a hammer. Such force could have resulted in far more serious injuries or even death. The nature of the offense does not weigh in favor of a more lenient sentence.

As for the character of the offender, we note Engler had substantial contact with the juvenile system, beginning when he was eleven years old. At the age of thirteen, Engler was

adjudicated on two counts of theft and leaving the scene of a property damage accident, for which he received probation. His antisocial behavior continued as he accumulated adjudications for battery, five counts of theft, auto theft (a class D felony if committed by an adult), possession of alcohol by a minor, and possession of marijuana and paraphernalia. In the two short years since becoming an adult, Engler has been convicted of several misdemeanors, including failure to stop after an accident resulting in damage, possession of marijuana, and operating with a controlled substance. His crimes have escalated resulting in the instant class A felony burglary conviction. Engler's numerous run-ins with the law as a juvenile and as an adult have not, however, deterred his anti-social behavior. Further, we note that past attempts at rehabilitation and leniency have been unsuccessful. Indeed, at the time of the current offense, Engler was on probation. Engler's consistent and continued failure to conform his conduct to the rules of society is telling of his character.

We further reject Engler's claim that his sentence is inappropriate given his young age. A defendant's youth is not necessarily a significant mitigating circumstance. *See Brown v. State*, 720 N.E.2d 1159 (Ind. 1999); *Smith v. State*, 872 N.E.2d 169 (Ind. Ct. App. 2007), *trans. denied*. Here, the trial court recognized Engler's youth as a mitigating circumstance, yet declined to give it substantial weight. To be sure, as the court recognized, in Engler's young life, he has accumulated a substantial juvenile and criminal history in a relatively short period of time, demonstrating his complete disregard for the law. In this vein, Engler's youth is not deserving of a lesser sentence. The trial court did not abuse its discretion in not attributing substantial mitigating weight to Engler's age.

We likewise reject Engler's argument that we should consider his guilty plea as a positive reflection of his character. The mere fact that a defendant pleads guilty does not render the resulting sentence inappropriate. The record reveals that Engler's decision to plead guilty was likely a pragmatic decision in light of his confession to the crime and the State's offer to dismiss six additional charges in exchange for his guilty plea to the instant offense. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*.

Having considered the nature of the offense and what the record reveals about Engler's character, we cannot say that the sentence imposed is inappropriate.

2.

Engler argues that the trial court abused its discretion in ordering Engler to pay restitution to Rob Parker. The State concedes, acknowledging the trial court's discretion was so limited.

In *James v. State*, 868 N.E.2d 543, 549 (Ind. Ct. App. 2007), this court held that "[a]bsent an agreement by the defendant, a trial court may not order restitution in an amount greater than the sums involved in those crimes to which the defendant actually pleaded guilty." *See also Green v. State*, 841 N.E.2d 874 (Ind. Ct. App. 2004) (holding that a trial court cannot order restitution for crimes to which the defendant does not plead guilty, of which the defendant is not convicted, or to which the defendant does not agree to repay as restitution). Here, Engler pleaded guilty to burglary resulting in bodily injury to Jesse

Parker. Engler did not plead guilty to any offense in which Rob was identified as a victim. Nor did Engler agree to pay restitution to Rob. Therefore, to the extent the trial court ordered Engler to pay restitution to Rob, the trial court's order is contrary to law.² We therefore reverse that part of the trial court's sentence calling for restitution to Rob as a condition of Engler's probation.

3.

Engler argues that the trial court abused its discretion in ordering him to pay restitution as a condition of probation without first inquiring into his ability to pay or fixing the manner of performance. In *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008), our Supreme Court stated:

The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. *Haltom v. State*, 832 N.E.2d 969, 971 (Ind. 2005). Restitution also serves to compensate the offender's victim. *Id.* And, when the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant's ability to pay. *See* Ind. Code § 35-38-2-2.3(a)(5) ('When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.'). This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant's failure to pay restitution. *Jaramillo v. State*, 803 N.E.2d 243, 250 (Ind. Ct. App. 2004).

Here, the trial court did not inquire into Engler's ability to pay before ordering that he make restitution to his victims as a condition of his probation. The State acknowledges that the trial court's restitution order is improper. We therefore remand to the trial court to fix the amount of restitution based on Engler's ability to pay and set the manner of performance.

² Engler does not dispute the restitution order with respect to the Jesse Parker or John Ferrel. During the sentencing hearing, Engler agreed to pay restitution for the crimes that he had committed and admitted his

Judgment affirmed in part, reversed in part, and remanded.

DARDEN, J., and BARNES, J., concur